

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Defendants.

(Docket Nos. 3, 4, 5, 7)

Order Denying Motion for Service Without Prejudice; Denying Motion for Appointment For Counsel; Denying Motion for Certification of Class Action; Denying Motion for Preliminary Injunction; Dismissing Complaint with Leave to Amend as to Plaintiff Gerstner; Dismissing Remaining Plaintiffs Without Prejudice

1 certification of class action, and a motion for a preliminary injunction. The Court
 2 concludes that this action cannot proceed as a class action and will therefore DENY
 3 Plaintiff's motion for class certification (docket no. 5) and dismiss all Plaintiffs without
 4 prejudice except for the named Plaintiff, Craig Gerstner. The Court will DENY
 5 Plaintiff's motion for service (docket no. 3) without prejudice and DENY Plaintiff's
 6 motion for appointment of counsel (docket no. 4) without prejudice. The Court will
 7 DENY Plaintiff's motion for preliminary injunction (docket no. 7) without prejudice.
 8 The Court will dismiss the complaint with leave to amend as to Plaintiff Gerstner to file
 9 an amended complaint including all of the claims he wishes to present containing
 10 allegations pertaining to himself only.

11 DISCUSSION

12 A. Class Certification and Joinder

13 Plaintiff Gerstner filed this action on behalf of himself and additional Plaintiffs,
 14 members of the Mens Advisory Council at CTF, purporting to represent all inmates who
 15 are or will be confined at the Correctional Training Facility, concerning the alleged
 16 unconstitutional taking and misappropriation of their Inmate Welfare Fund (Trust Fund)
 17 at the prison. See Complaint at 3. Plaintiff Gerstner filed a motion for certification of a
 18 class action pursuant to Federal Rule of Civil Procedure 23(b). The prerequisites to
 19 maintenance of a class action are that: (1) the class is so numerous that joinder of all
 20 members is impracticable, (2) there are common questions of law and fact, (3) the
 21 representative party's claims or defenses are typical of the class claims or defenses, and
 22 (4) the representative party will fairly and adequately protect the class interests. See Fed.
 23 R. Civ. P. 23(a). Pro se prisoner plaintiffs are not adequate class representatives able to
 24 fairly represent and adequately protect the interests of the class. Oxendine v. Williams,
 25 509 F.2d 1405, 1407 (4th Cir. 1975); see also Russell v. United States, 308 F.2d 78, 79
 26 (9th Cir. 1962) ("a litigant appearing in propria persona has no authority to represent
 27 anyone other than himself"), so class certification may be denied on that basis, see

1 Griffin v. Smith, 493 F. Supp. 129, 131 (W.D.N.Y. 1980) (denying class certification on
 2 basis that pro se prisoner cannot adequately represent class). Therefore, this action
 3 cannot proceed as a class action. Accordingly, Plaintiff Gerstner's motion for
 4 certification of a class action (docket no. 5) is DENIED. The additional Plaintiffs,
 5 members of the Mens Advisory Council at CTF, are DISMISSED as Plaintiffs from this
 6 action without prejudice.

7 Plaintiff Gerstner, the named Plaintiff, may proceed with this action. However, he
 8 must first file an amended complaint containing allegations pertaining to himself only.
 9 The current complaint containing allegations pertaining to all Plaintiffs is DISMISSED
 10 without prejudice. The amended complaint must be simple and concise and must include
 11 the civil case number used in this order (C 05-2763 JF (PR)) and the words "AMENDED
 12 COMPLAINT" on the first page. Failure to file a proper amended complaint **within**
 13 **thirty days** of the date of this order will result in the dismissal of this action without
 14 prejudice. The Court will enclose a copy of the civil rights complaint form with this
 15 order. Plaintiff's motion for service of the complaint (docket no. 3) is DENIED without
 16 prejudice.

17 B. Motion for Appointment of Counsel

18 _____Plaintiff Gerstner filed a motion for appointment of counsel. Plaintiff requests
 19 appointment of counsel because he is unable to afford counsel, the issues involved are
 20 complex, he requests class certification which will involve representing the interests of
 21 thousands of class members, and he has limited knowledge of the law. See Pl.'s Mot. at
 22 1-2. However, there is no constitutional right to counsel in a civil case. Lassiter v. Dep't
 23 of Social Services, 452 U.S. 18, 25 (1981). 28 U.S.C. § 1915 confers on a district court
 24 only the power to "request" that counsel represent a litigant who is proceeding in forma
 25 pauperis. 28 U.S.C. § 1915(e)(1). This does not give the courts the power to make
 26 "coercive appointments of counsel." Mallard v. United States Dist. Court, 490 U.S. 296,
 27 310 (1989).

1 The court may ask counsel to represent an indigent litigant under § 1915 only in
 2 “exceptional circumstances,” the determination of which requires an evaluation of both
 3 (1) the likelihood of success on the merits and (2) the ability of the plaintiff to articulate
 4 his claims pro se in light of the complexity of the legal issues involved. See Rand v.
 5 Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997); Terrell v. Brewer, 935 F.2d 1015, 1017
 6 (9th Cir. 1991); Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986). Both of
 7 these factors must be viewed together before reaching a decision on a request for counsel
 8 under § 1915. See id. Neither the need for discovery, nor the fact that the pro se litigant
 9 would be better served with the assistance of counsel, necessarily qualify the issues
 10 involved as complex. See Rand, 113 F.3d at 1525 (where plaintiff’s pursuit of discovery
 11 was comprehensive and focused and his papers were generally articulate and organized,
 12 district court did not abuse discretion in denying request for counsel). Because the Court
 13 has dismissed the instant complaint with leave to amend, the Court concludes that
 14 appointment of counsel is not necessary at this time. Accordingly, Plaintiff’s motion for
 15 appointment of counsel (docket no. 4) is DENIED without prejudice.

16 C. Motion for Preliminary Injunction

17 Plaintiff Gerstner filed a motion for a preliminary injunction requesting that the
 18 Court prohibit Defendant Barker and others from conducting searches of the Mens
 19 Advisory Council’s office at CTF and from seizing Plaintiff’s evidence in this action.

20 The Ninth Circuit has held that requests for injunctive relief may be based upon
 21 either of two sets of criteria. The “traditional” test requires the movants to: (1) establish a
 22 strong likelihood of success on the merits; (2) show the possibility of irreparable injury to
 23 the plaintiff if the preliminary relief is not granted; (3) show a balance of hardships
 24 favoring the movants¹; and (4) show that granting the injunction favors the public interest.

26 ¹ The district court cannot properly balance the hardships without taking into account the
 27 hardship, or lack of hardship, to the non-movants. Armstrong v. Mazurek, 94 F.3d 566, 568 (9th
 28 Cir. 1996).

1 Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League, 634 F.2d 1197, 1200
2 (9th Cir. 1980).

3 The "alternative" test requires that the movants demonstrate either a combination
4 of probable success on the merits and the possibility of irreparable injury, or that serious
5 questions are raised and the balance of hardships tips sharply in their favor. See
6 Diamontiney v. Borg, 918 F.2d 793, 795 (9th Cir. 1990); Alaska v. Native Village of
7 Venetie, 856 F.2d 1384, 1388 (9th Cir. 1988); American Motorcyclist Ass'n v. Watt, 714
8 F.2d 962, 965 (9th Cir. 1983). These two formulations represent two points on a sliding
9 scale in which the required degree of irreparable harm increases as the probability of
10 success decreases. Diamontiney, 918 F.2d at 795. At the very least, however, the moving
11 party must show a fair chance of success on the merits. Armstrong v. Mazurek, 94 F.3d
12 566, 567 (9th Cir. 1996).

13 The Court concludes that Plaintiff has not shown sufficient facts to establish that
14 he actually faces irreparable harm at this time. The Court has yet to review the merits of
15 the complaint and Plaintiff has not shown his probable success on the merits. Therefore,
16 Plaintiff's motion for a preliminary injunction (docket no. 7) is DENIED without
17 prejudice.

18 CONCLUSION

19 1. Plaintiff Gerstner's motion for certification of a class action (docket no. 5)
20 is DENIED. The additional Plaintiffs, members of the Mens Advisory Council at CTF,
21 are DISMISSED as Plaintiffs from this action without prejudice.

22 2. As to Plaintiff Gerstner, the complaint is hereby DISMISSED with leave to
23 amend, as indicated above, **within thirty days** from the date this order is filed. The
24 amended complaint must include the caption and civil case number used in this order
25 (C 05-2763 JF (PR)) and the words "AMENDED COMPLAINT" on the first page.
26 Because an amended complaint completely replaces the original complaint, Plaintiff must
27 include in it all the claims he wishes to present. See Ferdik v. Bonzelet, 963 F.2d 1258,

1 1262 (9th Cir.), cert. denied, 113 S. Ct. 321 (1992). Plaintiff may not incorporate any
2 material from the original complaint by reference. Plaintiff must include all
3 documentation and supporting information with the amended complaint. **Failure to**
4 **amend within the designated time will result in the dismissal of the complaint**
5 **without prejudice.**

6 3. Plaintiff's motion for service of the complaint (docket no. 3) is DENIED
7 without prejudice.

8 4. Plaintiff's motion for appointment of counsel (docket no. 4) is DENIED
9 without prejudice.

10 5. Plaintiff's motion for preliminary injunction (docket no. 7) is DENIED
11 without prejudice.

12 6. As to Plaintiff Gerstner, it is his responsibility to prosecute this case.
13 Plaintiff must keep the Court informed of any change of address by filing a separate paper
14 with the Clerk headed "Notice of Change of Address." He must comply with the Court's
15 orders in a timely fashion or ask for an extension of time to do so. Failure to comply may
16 result in the dismissal of this action pursuant to Federal Rule of Civil Procedure 41(b)

17 IT IS SO ORDERED.

18 DATED: 3/21/06


19 JEREMY FOGEL
United States District Judge

1 This is to certify that on 3/22/06, a copy of this ruling
2 was mailed to the following:

3 Craig Gerstner
4 E-59690
5 EW-228L
6 CTF - Soledad
7 P.O. Box 689
8 Soledad, CA 93960-0689
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28